

JEROME C. ROTH (State Bar No. 159483)
jerome.roth@mto.com

HOJOON HWANG (State Bar No. 184950)
hojoon.hwang@mto.com

MIRIAM KIM (State Bar No. 238230)
miriam.kim@mto.com

LAURA K. LIN (State Bar No. 281542)
laura.lin@mto.com

MUNGER, TOLLES & OLSON LLP
560 Mission Street

Twenty-Seventh Floor
San Francisco, California 94105-2907

Telephone: (415) 512-4000

Facsimile: (415) 512-4077

WILLIAM D. TEMKO (State Bar No. 98858)
william.temko@mto.com

MUNGER, TOLLES & OLSON LLP
355 S. Grand Avenue

Thirty-Fifth Floor
Los Angeles, California 90071-1560

Telephone: (213) 683-9100

Facsimile: (213) 687-3702

*Attorneys for Defendants LG Electronics, Inc.,
LG Electronics U.S.A., Inc., and LG Electronics
Taiwan Taipei Co., LTD.*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

IN RE: CATHODE RAY TUBE (CRT)
ANTITRUST LITIGATION

Master File No. 3:07-md-05944-sc (N.D. Cal)

MDL No. 1917

This Document Related to:

Best Buy Co., Inc., et al. v. Hitachi, Ltd., et al.,
Individual Case No. 11-cv-05513

*Alfred H. Siegel, As Trustee of the Circuit City
Stores, Inc. Liquidating Trust v. Hitachi, Ltd,*
et al., Individual Case No. 11-cv-05502

CompuCom Systems, Inc. v. Hitachi, Ltd., et
al., Individual Case No. 11-cv-06396

Costco Wholesale Corporation v. Hitachi,
Ltd., et al., Individual Case No. 11-cv-06397

Dell Inc. et al. v. Hitachi, Ltd., Individual Case
No. 13-cv-02171

**LGE DEFENDANTS' NOTICE OF
MOTION AND MOTION FOR PARTIAL
SUMMARY JUDGMENT ON FTAIA
GROUNDS; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF - Redacted**

[Declaration of Hojoon Hwang, Proposed
Order filed herewith]

Judge: Hon. Samuel Conti

Date: February 6, 2015

Time: 10:00 AM

Ctrm: 1, 17th Floor

1 *Electrograph Systems, Inc. et al. v. Hitachi,*
2 *Ltd.*, Individual Case No. 11-cv-01656

3 *Interbond Corp. of America d/b/a BrandsMart*
4 *USA v. Hitachi, Ltd.*, Individual Case No. 11-
5 06275

6 *Office Depot, Inc. v. Hitachi, Ltd.*, Individual
7 Case No. 11-cv-06276

8 *P.C. Richard & Son Long Island Corp. et al. v.*
9 *Hitachi, Ltd.*, Individual Case No. 12-cv-
10 02648

11 *Sears, Roebuck and Co. and Kmart Corp v.*
12 *Chunghwa Picture Tubes, Ltd., et al.*,
13 Individual Case No. 11-cv-05514

14 *Target Corp. v. Chunghwa Picture Tubes,*
15 *Ltd., et. al.*, Individual Case No. 11-cv-05514

16 *Schultze Agency Services, LLC on behalf of*
17 *Tweeter OPCO, LLC, et al., v. Technicolor SA,*
18 *et al.*, Individual Case No. 13-cv-05668

19 *Tech Data Corp., et al. v. Hitachi, LTD., et al.*,
20 Individual Case No. 13-cv-00151

21 *ViewSonic Corp. v. Chunghwa Picture Tubes,*
22 *Ltd.*, Individual Case No. 14-02510

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on February 6, 2015 at 10:00 a.m., or as soon thereafter as counsel may be heard, in the Courtroom of the Honorable Samuel Conti, located at 450 Golden Gate Avenue, 17th Floor, Courtroom 1, San Francisco, California, 94102, defendants LG Electronics, Inc. ("LGE"), LG Electronics USA, Inc. ("LGEUSA") and LG Electronics Taiwan Taipei Co., Ltd. ("LGETT") (collectively, "LGE Defendants") will move the Court, pursuant to Federal Rule of Civil Procedure 56, for summary judgment on all claims of the Direct Action Plaintiffs in the above-captioned actions (collectively, "Plaintiffs") on the grounds that Plaintiffs have failed to put forth competent evidence from which a jury could fairly estimate actionable damages consistent with the Foreign Trade Antitrust Improvements Act ("FTAIA") and/or that Plaintiffs seek damages that are barred by the FTAIA.

This motion is based on this Notice of Motion, the following Memorandum of Points and Authorities, the Declaration of Hojoon Hwang ("Hwang Decl."), and any materials attached thereto or otherwise found in the record, along with the argument of counsel and such other matters as the Court may consider.

Dated: November 7, 2014

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

By: /s/ Jerome C. Roth

JEROME C. ROTH (State Bar No. 159483)
jerome.roth@mto.com
HOJOON HWANG (State Bar No. 184950)
hojoon.hwang@mto.com
MIRIAM KIM (State Bar No. 238230)
miriam.kim@mto.com
MUNGER, TOLLES & OLSON LLP
560 Mission Street, Twenty-Seventh Floor
San Francisco, California 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

WILLIAM D. TEMKO (SBN 098858)

William.Temko@mto.com

MUNGER, TOLLES & OLSON LLP

355 South Grand Avenue, Thirty-Fifth Floor

Los Angeles, CA 90071-1560

Telephone: (213) 683-9100

Facsimile: (213) 687-3702

*Attorneys for Defendants LG Electronics, Inc., LG
Electronics USA, Inc., LG Electronics Taiwan Taipei Co.,
LTD.*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **STATEMENT OF THE ISSUES PRESENTED**

3 Whether Plaintiffs' claims based on purchases of CRT products containing CRTs that were
4 first sold outside the United States and then incorporated into a CRT product meet the
5 requirements of the FTAIA.

6 Whether summary judgment should be entered when Plaintiffs have failed to put forth
7 competent evidence that would permit the trier of fact to distinguish between alleged damages
8 based on claims that meet the requirements of the FTAIA and those that do not.

9 **PRELIMINARY STATEMENT**

10 The Direct Action Plaintiffs in this case seek billions of dollars in damages based on their
11 purchases of CRT products that were manufactured overseas. Virtually all of the CRTs – the
12 allegedly price-fixed product – contained in those TVs and monitors were manufactured, first sold,
13 and then incorporated into the finished products (and then possibly resold multiple times) before
14 they ever touched U.S. soil. The FTAIA requires that Plaintiffs demonstrate that their claims arise
15 out of direct, substantial and reasonably foreseeable effects on U.S. commerce of the alleged
16 price-fixing conspiracy. Plaintiffs have not done so. What is more, even if one simply assumed
17 that *some* of these purchases were affected by the conspiracy, Plaintiffs have provided no
18 competent evidence from which a reasonable jury can distinguish the damage claims that meet the
19 requirements of the FTAIA from those that do not. As a result, summary judgment is required on
20 the entirety of Plaintiffs' damage claims.

21 Certain Defendants have filed summary judgment motions addressing various aspects of
22 the FTAIA that bar some or all of Plaintiffs' claims. *See* Defendants' Joint Notice of Motion and
23 Motion For Summary Judgment Based Upon Plaintiffs' Failure To Distinguish Between
24 Actionable And Non-Actionable Damages Under The FTAIA (ECF No. 3008); Defendants' Joint
25 Notice Of Motion For Summary Judgment Based Upon Plaintiffs' Foreign Transactions Barred
26 Under The FTAIA (ECF No. 3003); and Defendants' Notice of Motion and Motion for Summary
27 Judgment on Plaintiffs' Indirect Claims Based On Foreign Sales (ECF No. 3006) (collectively, the
28 "Joint Motions"). LGE fully joins in and adopts the contentions of law and fact presented in these

Motions but addresses in this Joinder an additional defect in the damages analyses presented by the Direct Action Plaintiffs (“DAPs”) that renders the analyses incapable of satisfying the requirements of FTAIA, namely, that the DAPs’ damages models cannot as a matter of law meet the “give rise to” prong of the FTAIA because they rely on aggregate data and average prices and do not show or purport to show that the alleged conspiracy affected any particular transaction.

The FTAIA by its terms requires that the “give rise to” prong must be satisfied as to the “claim,” and it is equally well-settled that, in the context of an alleged price-fixing conspiracy – each purchase of a price-fixed good is a distinct cause of action. Because the DAPs’ analyses do not address and are not intended to address the effect of the conspiracy at the transaction level, they cannot supply the evidence necessary to meet the requirements of FTAIA. Accordingly, summary judgment must be granted.

ARGUMENT

I. Plaintiffs’ Claims Fail For The Additional Reason That They Lack Competent Evidence To Show That Each Of Their Claims Arises From Any Domestic Effect Of The Alleged Conspiracy

As set forth in the Joint Motions, the DAPs’ claims are based on the purchase of finished products (TVs and monitors) that contain CRTs. It is also undisputed that a significant portion of the CRTs were manufactured and initially sold overseas and then arrived in the U.S. as a component within TVs or monitors. With respect to this category of purchases, the DAPs must show¹ both that (1) the alleged conspiracy had a “ ‘direct, substantial, and reasonably foreseeable effect’ ” on U.S. commerce; and (2) that effect “gives rise to” the plaintiff’s claim. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004) (*quoting* 15 U.S.C. §§ 6a(1), (2).)

The DAPs are likely to assert, and their experts’ analyses reflect the theory, that the alleged overcharge on CRTs first sold overseas was passed on by finished product manufacturers in the prices of TVs and monitors, and that, by purchasing the finished products in the U.S., they

¹ As set forth in the Joint Motions, the “import commerce” exclusion from the scope of FTAIA does not apply where the CRT was first sold overseas to a finished product manufacturer.

1 suffered injury that constitutes the domestic effect. Even assuming that the DAPs are able to
 2 overcome the hurdle of showing “direct, substantial, and reasonably foreseeable effect” on U.S.
 3 commerce, which they cannot, the DAPs’ claims would still fail because their analyses is
 4 incapable of showing that the domestic effects “g[a]ve rise to” each of their claims.

5 The Supreme Court has held that the “give rise to” prong is specific to the “claim” being
 6 asserted. In *Empagran*, the court held that the FTAIA’s reference to “a claim” refers to “the
 7 ‘plaintiff’s claim’ or ‘the claim at issue,’” rather than any claim that may arise from the domestic
 8 effects, finding that this construction most faithfully reflected the “FTAIA’s basic intent.” 542
 9 U.S. at 174-75. Thus, the “give rise to” prong must be satisfied with respect to the claims at issue
 10 in the case.

11 In the context of an alleged price-fixing conspiracy, it is well-settled that a new and distinct
 12 claim accrues with each purchase of the price-fixed product containing an overcharge. *See Klehr*
 13 *v. A.O. Smith Corp.*, 521 U.S. 179, 189-90 (1997) (“in the case of . . . a price-fixing conspiracy
 14 that brings about a series of unlawfully high priced sales over a period of years . . . each sale to the
 15 plaintiff” represents “separate accrual” of a claim for which plaintiff may recover); *see also*
 16 *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1300 (9th Cir. 1986) (“[a] civil cause of
 17 action under the antitrust laws arises at each time the plaintiff’s interest is invaded to his damage”
 18 and “the plaintiff possesses a cause of action for that damage” caused by each overt act) (internal
 19 quotation marks and citation omitted); *In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274, 290
 20 (4th Cir. 2007) (“each time a plaintiff is injured by an act of the defendant a cause of action
 21 accrues to him to recover the damages caused by that act . . .”) (*quoting Zenith Radio Corp. v.*
 22 *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)). Because each purchase of a price-fixed
 23 product constitutes a “cause of action,” the “give rise to” prong of the FTAIA must be satisfied
 24 with respect to that “cause of action,” namely, each transaction for which Plaintiffs seek damage.

25 Despite these requirements, the DAPs’ damages models are incapable of determining
 26 whether there was an overcharge on the CRT or how much of that overcharge was passed through
 27 in the price of the TV or monitor with respect to any particular transaction. The models put forth
 28 by Plaintiffs’ experts calculate average overcharges at no greater level of disaggregation than the

1 year and quarter, type of CRT (i.e., CDT or CPT), and size of the CRT, with no attempt to
2 examine particular transactions.

3 Dr. McClave, who estimates the alleged overcharge for most of the DAPs, [REDACTED]
4 [REDACTED] (Hwang Decl. Ex. 3 (Expert
5 Rebuttal Report of Dr. James McClave, Sept. 26, 2015 at 20)), and to have [REDACTED]
6 [REDACTED] (Hwang Decl. Ex. 4 (Expert Report of Dr.
7 James T. McClave Apr. 15, 2014, at 12 (Table 1).)

8 Dr. Frankel, the damages expert for the same DAPs, then [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] *See e.g.*, Hwang Decl. Ex. 5 (Alan Frankel
12 (Best Buy) Report, Apr. 15, 2014, ¶ 9); Hwang Decl. Ex. 6 (Alan Frankel Dep. (July 10, 2014)
13 51:7-19. [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED] *Id.* at 160:11-162:6.

17 [REDACTED]
18 [REDACTED]
19 [REDACTED] Hwang Decl. Ex. 1
20 (Mohan Rao Dep. 85:6-86: [REDACTED]

21 [REDACTED]
22 [REDACTED] *Id.* at 116:12-117:6. [REDACTED]
23 [REDACTED], *see* Hwang
24 Decl. Ex. 7 (Expert Report of Mohan Rao, Ph.D., Apr. 15, 2014 Data Appendix at 16), and [REDACTED]

25 [REDACTED] (*id.* at Tab 17)), [REDACTED]
26 [REDACTED] *Id.* ¶ 78. [REDACTED]

27 [REDACTED]

1 The fact that these models yield an average overcharge rate is not sufficient to show that
 2 the price of TVs or monitors purchased in any given transaction – i.e., the “claim” at issue for
 3 FTAIA purposes – was affected by the alleged conspiracy. An average is just what it purports to
 4 be: an average. It does not say anything about whether a particular transaction that gives rise to a
 5 claim was affected. Indeed, [REDACTED]

6 [REDACTED]
 7 [REDACTED] See Hwang Decl. Ex. 1 (Rao Dep. 243:4-244:25 [REDACTED])
 8 [REDACTED]
 9 [REDACTED] Hwang Decl. Ex. 8 [REDACTED]
 10 [REDACTED].

11 Instructive in this regard is the recent decision of the court in *In re Optical Disk Drive*
 12 *Antitrust Litigation*, -- F.R.D.--, 2014 WL 4965655 (N.D. Cal. Oct. 3, 2014). In denying class
 13 certification, Judge Seeborg of this court found that the plaintiffs failed to demonstrate that they
 14 could prove that all or virtually all class members were impacted by the alleged conspiracy using
 15 proof common to the class. The court rejected an aggregate estimate of overcharges put forth by
 16 the DPP expert because the model was designed to yield, and thereby assumed, a single
 17 overcharge rate for all class members over the entire class period. *Id.* at *8 (“Dr. French asserts
 18 that each class member may calculate his or her damages merely by ‘applying the overcharge
 19 percentage estimated on a class-wide basis to [his or her] individual purchases.’ While Dr. French
 20 calculates that the overcharge was about 11.48 percent in the aggregate, nothing in the regression
 21 methodology attempts to show that all or nearly all purchasers were overcharged in that amount,
 22 *or in any amount at all.*”) (emphasis added). The court similarly rejected the analysis of the IPP
 23 expert because, although his analysis was more complex than Dr. French’s, the model still
 24 “reflect[ed] *aggregate* estimates for all purchasers purchasing ODDs of particular types in given
 25 years.” *Id.* *11 (emphasis added). As such, the court found, the model was incapable of showing
 26 that particular class members were injured.

27 Plaintiffs’ models here precisely track these deficiencies in purporting to generate
 28 aggregate estimates for CRTs of particular type and size in particular time intervals. But none

1 individually analyzes the transactions – the FTAIA “claim[s]” – to determine whether each was
2 affected by the alleged conspiracy. Without such analysis, Plaintiffs have no evidence that the
3 domestic effects of the alleged conspiracy “g[a]ve rise to” any particular claim. Even if some
4 transactions were affected, the DAPs cannot recover on *all* of their CRT product purchase claims
5 on the basis that *some* or even *most* of the claims meet the requirements of the FTAIA.

6 **CONCLUSION**

7 Because the DAPs have failed to adduce evidence sufficient to meet the “give rise to”
8 prong of the FTAIA, and for all of the reasons stated in the Joint FTAIA Motions, summary
9 judgment should be granted.

10 DATED: November 7, 2014

MUNGER, TOLLES & OLSON LLP

11
12
13 By: /s/ Jerome C. Roth

14 JEROME C. ROTH

15 Attorneys for Defendants LG ELECTRONICS, INC.,
16 LG ELECTRONICS U.S.A., INC., and LG
17 ELECTRONICS TAIWAN TAIPEI CO., LTD.
18
19
20
21
22
23
24
25
26
27
28